



ALAN WILSON
ATTORNEY GENERAL

September 19, 2014

Sean P. Thornton, Esq.
PO Box 1880
Bluffton, SC 29910

Dear Mr. Thornton:

This Office received your request for an opinion as to whether the position of Colleton County Attorney is an office for dual office holding purposes.

LAW/ANALYSIS:

The South Carolina Constitution provides that “no person may hold two offices of honor or profit at the same time. This limitation does not apply to officers in the militia, notaries public, members of lawfully and regularly organized fire departments, constables, or delegates to a constitutional convention.” S.C. Const. art. XVII § 1A.

The South Carolina Supreme Court explains that an “office” for dual office holding purposes is:

“One who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent, is a public officer.” Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907). “In considering whether a particular position is an office in the constitutional sense, it must be demonstrated that “[t]he power of appointment comes from the state, the authority is derived from the law, and the duties are exercised for the benefit of the public.” Willis v. Aiken County, 203 S.C. 96, 103 26 S.E.2d 313, 316 (1943). “The powers conferred and the duties to be discharged with regard to a public office must be defined, directly or impliedly, by the legislature or through legislative authority...” 63C Am Jur.2d Public Officers and Employees § 5 (2009).

Segars-Andrews v. Judicial Merit Selection Commission, 387 S.C. 109, 691 S.E.2d 453 (2010). “Other relevant considerations [as to whether a position is a public office] include: ‘whether the position was created by the legislature; whether the qualifications for appointment are established; whether the duties, tenure, salary, bond, and oath are prescribed or required; whether the one occupying the position is a representative of the sovereign; among others.’” See Op. S.C. Atty. Gen., June 17, 2013 (2013 WL 3243063) (quoting State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61,62 (1980)).

Whether a county attorney holds an office is not clear cut. It often depends on analyzing certain criteria. In a prior opinion, we elucidated:

Whether or not a county attorney is an office would depend upon how the office itself is created. If the position is created by state statute or county ordinance and the duties of the position make it an 'office' rather than mere employment, it would be violative of the dual office prohibitions of the State Constitution for one individual to hold the office of county attorney and another office.

Op. S.C. Atty. Gen., July 13, 1981 (1981 WL 157862) (quoting Opinion to James I. Redfearn, Esquire, dated August 28, 1974).

The position of Colleton County Attorney is created by ordinance. According to your letter, Colleton County Code of Ordinances § 2.30.020 states the following:

County Attorney. The council shall designate and contract an attorney who is not a member of the council to serve as the county attorney. He shall perform such duties as are assigned to him from time to time by council. He shall prepare all deeds, contracts, ordinances and other legal documents necessary to assist council in performing its functions. He shall attend all council meetings and advise council, when required, of matters and things pertaining to the legality of proceedings before council and its actions thereon. He shall participate in any litigation involving the county and shall carry out any assignments delegated to him by council. The county attorney shall serve at the pleasure of the council, and his compensation and contractual relationship shall be set by council.

Since the position is created by county ordinance, we must review the duties and other particulars to determine if the Colleton County Attorney holds an office or is an independent contractor or employee.¹ The duties prescribed by the ordinance do not appear to involve an exercise of the sovereign power. The Colleton County Attorney is merely performing duties assigned to him by the County Council; advising the Council; preparing legal documents for the Council; and representing the County in civil matters. The County Attorney is not independently making decisions and the County Attorney and the County Council appear to have an attorney-client relationship.

Additionally, the terms of the ordinance lead to the conclusion that the Colleton County Attorney is an independent contractor or employee, rather than an office holder. The ordinance clearly states that the

¹ “. . . one who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about public work or business, is a mere employee.”

Op. S.C. Atty. Gen., March 6, 1980 (1980 WL 121076) (quoting Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907)).

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County Council shall “contract” with an attorney and set up the “contractual relationship” between the County and the County Attorney.

Since the County Attorney is to “serve at the pleasure of the council,” the ordinance does not set a term of office for the position. The ordinance does not provide the salary amount of the position since it states that compensation “shall be set by council.” The Colleton County Attorney is not required to take an oath by the ordinance. Furthermore, the position is part-time.

Because the relationship between the Colleton County Attorney and the County Council is a contractual one, we do not believe that the Colleton County Attorney is an office for dual office holding purposes.

CONCLUSION

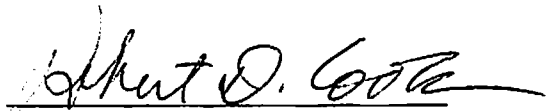
In conclusion, this Office believes that the Colleton County Attorney is not an office for dual office holding purposes since the relationship between the Colleton County Attorney and the County Council is a contractual one.

Sincerely,



Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General